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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1445

ELVIN LEE BYNUM, JOSEPH CORDOVANO, ABRAHAM WRIGHT, LANCE SMALL, NEWBRY MITCHELL, FANNIE MAE GARNETT, JACQUELINE FULLER DYSON, JOHN CONIGLIO, ANGELO MELI, VINCENT ALTAMURA, IRVING BIRNBAUM, CHARLES TUZZOLINO, and LEVIS NEDD,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

On Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Introduction

We respectfully submit that the Brief for the United States in opposition to the Petition amply demonstrates that several important questions are raised with respect to the statutory and constitutional requirements applicable to the administration of the Federal wiretap statute, 18 U.S.C. § 2510-§ 2520 [hereinafter, "Title III"].

In short, this Court has not interpreted the "necessity", "minimization", "standing", and "harmless error" concepts within the context of the requirements of Title III, nor has this Court ruled upon the constitutionality (Fourth Amendment Search and Seizure and Fifth Amendment Due Process) of Title III with respect to the application of these concepts.

To paraphrase Dean Prosser, the assault upon the citadel of *privacy* proceeds apace.[1] The authorization procedures, as well as the post-wiretap analysis and evaluation of those procedures, in the present case appear to reflect a general policy of lenity on the part of the Federal Circuit and District Courts with respect to the statutory and constitutional standards applicable to electronic surveillance by law enforcement officers.

A major underlying purpose of Title III was to protect the privacy of wire and oral communications by establishing comprehensive procedures for regulating the use of electronic surveillance. Judges who authorize the use of such surveillance must strictly adhere to the statute's procedures and the congressional intent behind the establishment of such procedures. The failure to do so defeats the very safeguards which motivated Congress to enact Title III and encourages an ever wider encroachment upon constitutionally protected liberties.[2]

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[1] Prosser, Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960).

[2] See: *United States* v. *Giordano*, 416 U.S. 505 (1974); S. Rep. No. 1097, 90th Cong., 2d Sess. 67 (1968), at 214 (individual) view of Senator Scott), p. 220 (individual view of Senator Eastland), p. 225 (individual views of Senators Dirkson, Hruska, Scott, and Thurmond); Hearings on Controlling Crime Through More Effective Law Enforcement Before the Sub-Committee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. (1967), at p. 508 (statement of Senator McClellan); Senate Floor Debate on Title III: 114 Cong. Rec. 14474 (1968) (remarks of Senator Long); and Senator McClellan's remarks with respect to Report of the First Year of Operation of Title III, 115 Cong. Rec. 23240-1 (1969).

The instant Petition presents an ideal vehicle for this Court to authoritatively interpret the provisions in question. The record is a complete one and provides a detailed analysis of what, in fact, occurred. Since each of the statutory safeguards claimed to have been violated inter-relate with the others, the practical problems of administration, supervision and implementation are presented within a realistic context.

I.

The wiretap applications failed to establish necessity for the issuance of any electronic surveillance order.[3]

The government concedes that the information set forth in the initial wiretap application, "stated facts sufficient to constitute probable cause for the arrest of Bynum before the interceptions were authorized . . ." (Gov. Br., at p. 9). It contends, however, that, although Bynum was "the main target of the interception" the use of electronic surveillance was justified since: (1) "The investigation was directed at discovering the identity of other persons involved in a major widespread conspiracy" and (2) 'The facts in the affidavits were largely based on information from informants and included sufficient reasons to believe that these informants would refuse to testify against Bynum, thereby further

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[3] This issue is discussed at pp. 12-13, 28-30 of the Petition and at pp. 9-10 of the Government's Brief in Opposition. An excellent analysis of the history, purpose and implementation of the necessity requirement of Title III is to be found in Cooke, *Electronic Surveillance, Title III, and the Requirement of Necessity*, 2 Hastings Constitutional Law Quarterly 571 (Spring, 1975). A recent application of the necessity requirement in conformity with the view urged by petitioners is to be found in *United States* v. *Kalustian* (9th Cir., August 4, 1975; Docket No. 74-3314), — F.2d —.

establishing the necessity for the wire interceptions" (Gov. Br., at p. 9-10). This constitutes the totality of the government's response to our contention that the issuance of the wiretap orders violated the necessity requirements of 18 U.S.C. § 2518 §§(1)(c) and §§(3)(c).

The affidavit submitted in support of the initial wiretap application is set forth at H. 617-630 [4] and is dated January 28, 1971.

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[4] The following abbreviations are used in the Petition and in this Reply:

"—a"—is a reference to the petitioners' Appendix which was separately bound and filed with the Petition. The Appendix contains the three opinions of the Court of Appeals (Appendices A, C, & J, respectively), the two opinions of the District Court (Appendices B & I, respectively), the Court of Appeals orders denying rehearing (Appendices D, E, & K, respectively), the remand orders of this Court (Appendix G) and of the Court of Appeals (Appendix H), and the electronic surveillance provisions of 18 U.S.C. § 2510-§ 2520 (Appendix F).

Where appropriate, the three opinions of the Court of Appeals will be referred to as *"Bynum I"*, *"Bynum II"* and *"Bynum III"*, respectively.

"T—"—is a reference to the seven volumes of trial testimony and exhibits which constituted the Appellants' Appendix in the Court of Appeals upon the initial appeal. These volumes have been certified to this Court.

"H—"—is a reference to the four volumes of testimony and exhibits which resulted from the evidentiary hearing which was conducted in the District Court pursuant to the direction of the Court of Appeals in *Bynum I*. These volumes have also been certified to this Court.

"C—"—is a reference to the transcript of hearings held in the District Court with respect to the question of whether the Attorney General of the United States had authorized an application for an extension of the initial wiretap. Following that hearing, the Court of Appeals found that extension not to have been properly authorized (*Bynum III*, 138a-139a). In its Reply to the instant Petition, the government contests that finding by the Court of Appeals (Gov. Br., at pp. 20-24). For that reason, we will have a copy of the hearing transcript certified to this Court.

The affidavit reveals that four independent confidential informants, all previously having been demonstrated to be reliable, were providing the government with a substantial amount of valuable information with respect to all the criminal activities under investigation and with respect to Bynum's daily activities. The affidavit is *silent* as to whether those informants were providing information concerning Bynum's alleged co-conspirators. It is also *silent* as to whether those informants would be willing to testify for the government in a criminal proceeding. It does state that equipping an informant with clandestine recording equipment was considered to be too dangerous (H. 627) and that the informants were afraid they might be killed if their identities were to become known to Bynum (H. 628). This later assertion is made only within the context of the informants performing a more daring *investigative* function. As already indicated, no claim is made that the informants had refused to testify or that the informants had been offered protective custody or new identities or immunity from prosecution.

The affidavit alleges that Bynum's toll calls are important to the investigation and that the government had secured the telephone company records with respect to sixty-seven such calls. Verifying our contention that normal investigative methods had not been exhausted, the affidavit recites "*Time has not allowed a complete analysis of the toll information at the time of this affidavit*, but the toll records do reflect the same patterns of contacts as Bynum is known to have according to the information set forth in paragraphs numbered 5 and 9 above" (H. 625; emphasis added).

The affidavit sets forth no information concerning visual surveillance of Bynum, his premises or his associates. However, such visual surveillance was conducted on an extensive level as demonstrated by the

visual surveillance reports which were made available during the post-trial hearings in this case (H. 1065-1175).

Perhaps most important, is the failure of the affidavit to advise the Court with respect to the relationship which the government had with George Stewart, who testified at trial as the principal government witness. In December, 1970, Stewart agreed to become an informant for the government with respect to Bynum's activities (*Bynum II*, 54a). The Court of Appeals has accurately described Stewart as one, "who while acting as *a trusted key member* of the conspiracy, was simultaneously supplying the government with *detailed* information about the criminal activities of his associates." (*Bynum I*, 4a-5a). [Emphasis added]. Stewart allegedly bought, sold and stored narcotics for the conspiracy and dealt with each of the persons who were eventually indicted (*See*: *Bynum I* [1a-11a] and *Bynum II* [50a-61a]). Through to the point of the arrests in this case, Stewart "was fully accepted as a member of the core group" (*Bynum II*, 56a). During this period, he provided the government with samples of drugs he allegedly received from Bynum and Cordovano, advised the government as to the presence of wholesale lots of narcotics at particular premises, photographed substantial amounts of cash used in narcotics transactions, and tape recorded his own telephone conversations with Bynum and Cordovano. (*Bynum II*, 57a; Government Exhibits 1-4, 8, 13-15; T. 3193-3202, 3208, 3223-3227). In short, as found by the Court of Appeals:

> "[T]he detailed facts which amply document and support the government's case here, are uniquely provided by the informant-witness Sewart, whose regular reports to government agents enabled them to independently make surveillance and confirm the conspiracy and the overt acts charged in the indictment.***"

It is no wonder that the government's Brief in Opposition fails to make any effort to show that the application for the warrant satisfied the requirements of 18 U.S.C. § 2518(1)(c)[5] or to establish that the judge who issued the wiretap warrant was provided with a basis to conclude that the requirements of 18 U.S.C. § 2518(3)(c) had been satisfied.[6]

There can be no doubt that 18 U.S.C. § 2518 intended the use of electronic surveillance solely as "an investigative tool of last resort."[7] In *United States* v. *Kahn*, 415 U.S. 143 at 153 n. 12 (1974), this Court found that the necessity requirement is "designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime."[8]

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[5] I.e., that the application include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

[6] I.e., before authorizing a wiretap, the issuing judge is required to find that, "normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

[7] United States Department of Justice, *Manual for Conduct of Electronic Surveillance* (1969), at p. 18; to the same effect, *see*: Remarks of Senator McClellan, 115 Cong. Rec. 23240 (1969).

[8] Aside from the investigative techniques successfully used by the government, none of the possible investigative techniques already indicated were used by the government. Thus, for example, although Stewart reported to government agents that four and one-half kilos of cocaine, worth $45,000., were hidden in a particular house, the agents did not attempt to get a search warrant (T. 1487-8). Also, the government did not indicate in its application why a pen register could not have been used to record telephone numbers dialed on the telephones in question. *See*: *United States* v. *Focarile*, 340 F. Supp. 1033, 1038-41 (D. Md.), *aff'd sub nom. United States* v. *Giordano*, 469 F.2d 522 (4th Cir., 1972), *aff'd* 416 U.S. 505 (1974). Pen registers are not governed by the procedures established in Title III. *United States* v. *Giordano*, 416 U.S. 505, 548-53 (1974) (Powell, J., concurring in part and dissenting in part).

We respectfully submit that the necessity requirements of the statute are not met by a mere showing that normal investigative techniques would be *more difficult* to implement than electronic surveillance. The statutory requirement is that normal investigative techniques "be unlikely to succeed if tried or . . . too dangerous." 18 U.S.C. § 2518(1)(c) and 18 U.S.C. § 2518(3)(c). Particularly since this is the statutory implementation of a constitutional requirement,[9] boilerplate generalizations and conclusory allegations should not be followed by the perfunctory judicial grant of a wiretap order.

Since the statutory and constitutional requirement of necessity was not demonstrated—indeed, was not present—in this case, all of the resulting electronic surveillance should have been excluded from evidence. *United States* v. *Kalustian* (9th Cir., August 4, 1975; Docket No. 74-3314), — F.2d —.

II.

The government grossly failed to minimize the interception of irrelevant, innocent telephone conversations.[10]

We shall not repeat the documented factual analysis set forth in the Petition. The government's effort to establish a rational attempt to comply with the minimization requirements of the statute directly contradicts the record.

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[9] *Berger* v. *New York*, 388 U.S. 41, 60 (1967); *Katz* v. *Unite States*, 389 U.S. 347, 355 fn. 16 (1967); Brief for Appellant, (United States) at pp. 30-1, in *United States* v. *Giordano*, 416 U.S. 505 (1974); *A.B.A. Project on Minimum Standards for Criminal Justice—Standards Relating to Electronic Surveillance* (Approved Draft, 1971), at p. 104; Blakey & Hancock, *A Proposed Electronic Surveillance Control Act*, 43 Notre Dame Law. 657, 673 (1967-68).

[10] This issue is discussed at pp. 10-26, 30-35 of the Petition, and at pp. 10-17 of the government's Brief in Opposition.

The government's Brief in Opposition makes several assertions of policy which strike at the heart of the minimization requirement.

A. The government contends that the adolescent conversations of the teenage babysitter with her teenage friends were properly subject to interception since "some of these conversations described activities of the conspirators which provided useful leads" (Gov. Br., at p. 13). Thus, according to the government, if an innocent individual has innocent conversations in which she tells other innocent individuals that her employer is in the house or out of the house or having a conversation with someone, then such conversations can properly be intercepted (Gov. Br., at p. 13).

B. The government contends that it may intercept all of the conversations of an alleged conspirator, even though innocent in nature, because of the possibility that "at some time during an otherwise innocent conversation, she [the alleged conspirator] would say something that would be *useful* to the investigation, such as the identification of other persons involved in the ring" (Gov. Br., at pp. 13-14).

We respectfully submit that if the government is permitted to intercept, as they did here, all conversations which fall within the above noted two categories, then the minimization requirement is meaningless. The government's asserted right to intercept effectively extends to all conversations which pass over the telephone instrument since it can never be pre-determined whether something of "value" may be said. In this regard, "value" appears to mean anything concerning the movements or relationships of targeted individuals. Whether those activities are innocent or not. In essence, the government is arguing that it can eavesdrop on conversations in the same manner that it can "tail" people on the street.

III.

If the agents did, in fact, minimize the interception of conversations to the extent required by Title III, then the wiretapping in this case constituted a general search of the type prohibited by the Fourth Amendment of the United States Constitution.[11]

The government responds to our constitutional attack by merely asserting that "many decisions . . . have upheld the validity of 18 U.S.C. § 2510-2520 against challenges that the statute permits an unconstitutionally broad general search" (Gov. Br., fn. 19 at p. 17).[12] That assertion is an inartful attempt to sidestep the issue. As was stated in *United States* v. *Kalustian, supra,* slip sheet opinion at p. 5: "The Act has been declared constitutional only because of its precise requirements and its provisions for close judicial scrutiny." If, in fact, the precise requirements of the Act nevertheless result in an intrusion upon a constitutionally protected right, within the facts of a particular case, then the Constitution is violated.

We reassert our contention that if Title III authorizes the total interception which occurred during the extended period of electronic surveillance in this case, then Title III permits the issuance of a general warrant in violation of the Fourth Amendment.

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[11] This issue is discussed at pp. 36-37 of the Petition and in footnote 19 at p. 17 of the government's Brief in Opposition. With respect to this issue, *see*: Note, Minimization of Wire Interception: *Pre-Search Guidelines and Post-Search Remedies*, 26 Stan. L. Rev. 1411 (1974).

[12] This Court has never decided the issue of the constitutionality of Title III.

IV.

The use of conversations derived from the illegal extension tap was not harmless error.[13]

A total of eight telephone conversations were received in evidence at the trial. Six of these were between Bynum and Cordovano and two were between Bynum and Stewart (Gov. Exhibits 1-4, 8, 13-15; T. 3193-3202, 3208, 3223-3227). Four of those conversations were the product of the extension tap and were played for the jury (A. 2663, 2664, 2667, 2668). During the minimization hearing, the District Court explicitly found that "The inculpatory nature of these with picaune exceptions *is patent*" (14a—fn. 3) (emphasis added). Additionally, as quoted, in the Petition, at p. 42, the government argued in its brief in the Court of Appeals that the identification process in this case "was substantially based on information obtained from the wiretap." The government also argued in the Court of Appeals that the bulk of the intercepted conversations in this case were "of evidentiary value" to its investigation (H. 103).

In an effort to circumvent the illegality of the extension tap, it is now argued that the interceptions over that tap, constituted harmless error. In support of that contention, the government claims that the conversations used in evidence were "merely cumulative" as to the defendants Bynum and Cordovano (Gov. Br., at pp. 18-19 —fn. 20). As to the intercepted conversations not introduced into evidence, the government contends that petitioners have failed to show "a single instance where such an interception led to evidence against them or prejudiced them in any way" (Gov. Br., p. 19).

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[13] This issue is discussed at pp. 38-44 of the Petition and at pp. 17-21 of the government's Brief in Opposition.

At p. 43-4 of the Petition, we set forth the manner in which the government effectively utilized the four conversations in evidence. Having utilized an illegal tap, in violation of statutory and constitutional commands, the burden is upon the government to establish that this use was harmless beyond a reasonable doubt, *Chapman* v. *California*, 386 U.S. 18 (1967). Since this contention is conclusively refuted by the above quoted holding of the District Court and by the government's own contentions in the District Court and in the Court of Appeals, they should not be now heard to claim, in the face of the record, that the error was harmless.

With respect to the hundreds of other telephone conversations seized over the extension tap, the same arguments apply with equal force. That they were not placed directly in evidence is not controlling. If they were of assistance to the investigation (as the government claims they were), if they facilitated visual surveillance, if they resulted in the identification of alleged conspirators, or if they aided the government's direction of its informants during the investigation, then it was for the government to establish, beyond a reasonable doubt, that none of the fruit of the wiretapping enhanced the prosecution's case at trial.

When confronted with the harmless error ruling of the Court of Appeals, petitioners sought rehearing and, *inter alia*, requested that the Court of Appeals "remand the matter for a further factual hearing" as to the issue of harmless error. (Petition for Rehearing and Memorandum, pp. 4-5). Rehearing was denied (142a), and the instant Petition for a Writ of Certiorari was thereafter filed.

V.

The Court of Appeals erroneously held that certain of the petitioners do not have standing to contest the legality of the wiretaps.[14]

The government contends that none of the conversations of petitioners Coniglio, Meli, Altamura, Birnbaum and Tuzzolino were intercepted at any time. This assertion is erroneous as to petitioner Birnbaum.[15] As to the petitioners Wright, Small, Mitchell, Dyson and Nedd, the government alleges a lack of standing since none of their intercepted conversations were used in evidence and since those petitioners have not demonstrated any prejudice (Gov. Br., at pp. 18-20).

The government bottoms its standing argument upon a general citation, without explanation, to *Alderman* v. *United States*, 394 U.S. 165 (1969). *Alderman* concerned wiretaps which were executed and which were received in evidence prior to the enactment of Title III. Dicta in *Alderman*, 394 U.S. at 176, fn. 9, indicates that the standing criteria enunciated in Title III, 18 U.S.C. § 2518(10)(a) "should be construed in accordance with existing standing rules." However, the footnote in *Alderman* appears to overlook the fact that 18 U.S.C. § 2510(11) defines aggrieved person:

> " 'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

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[14] This issue is discussed at pp. 44-47 of the Petition, and at pp. 18-20 of the government's Brief in Opposition.

[15] In fn. 28 at p. 46 of the Petition, we cite as examples of intercepted telephone calls by Birnbaum the conversations which are numbered W-2597, W-2600 and W-2602, which are logged at H. 984-5.

Thus, for the reasons advanced in the Petition, all of the petitioners have standing by virtue of the statutory definition.

VI.

The Court of Appeals properly held that the Court ordered extension of the first wiretap was illegal since that extension had not been authorized by the Attorney General.[16]

18 U.S.C. § 2516(1) provides that a Federal judge may issue a wiretap order only when the application for that order has been authorized by the Attorney General of the United States or by an assistant attorney general specially designated by the Attorney General. As with an original application, an extension application may only be made upon such authority, 18 U.S.C. § 2518(1) and § 2518(5).

At trial, in response to defense demands, the government filed with the trial court an affidavit of Sol Lindenbaum, the Executive Assistant to the Attorney General (A. 119). The affidavit revealed that the authorization for the February 18, 1971 extension of the "W" tap had been approved by Lindenbaum, "pursuant to the authorization which he [the Attorney General] had given to me to act in the circumstances and [I] caused his [the Attorney General's] initials to be placed on the memorandum to Will Wilson * *-*' (A. 120). [Bracketed material added].

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[16] This issue is not discussed in the Petition since the Court of Appeals ruled in favor of the petitioners. However, the government now asserts that the Court of Appeals erroneously concluded that the interceptions during the extension period were unlawful (Gov. Br., at pp. 20-24).

The memorandum to which Mr. Lindenbaum referred is dated February 18, 1971, is addressed to Mr. Wilson, and states, in pertinent part:

> "Pursuant to the power conferred on me by § 2516 of Title 18, United States Code, you are hereby specifically designated to exercise that power for the purpose of authorizing Charles B. Updike to make the above described application" (A. 123).

Nowhere on the memorandum is it indicated that Mr. Lindenmaum had affixed the Attorney General's initials to the document, or, indeed, that Mr. Lindenbaum had anything to do with the document. The testimony of Mr. Mitchell and Mr. Lindenbaum at the hearing, unequivocally showed that no such authority had been given to Mr. Lindenbaum.

Upon the prior Petition for a Writ of Certiorari, this Court granted certiorari as to all petitioners, vacated the judgment, and remanded the case to the Court of Appeals for further consideration as to the issue of authorization in light of *United States* v. *Giordano*, 416 U.S. 505 (108a). The Court of Appeals then remanded the case to the District Court for further consideration as to that issue (109a-110a). Following an evidentiary hearing, the District Court issued its opinion, findings and conclusions, holding that a specific authorization of the extension tap was not legally required (110a-135a). The Court of Appeals rejected the holding of the District Court and agreed with the contention of petitioners Bynum and Cordovano that the extension wiretap had not properly been authorized (140a). However, the Court of Appeals found the use of the intercepted conversations to be cumulative and, thus, harmless error.

The government now contests the holding of the Court of Appeals and urges that the extension tap was properly authorized. The government's theory is bottomed upon the fact that the two distinct telephones were subscribed for in the same name, were located in the same one-family premises, and were allegedly used by the same individuals for the same illegal purposes. It follows, argues the government, that proper authorization to tap one of the telephones implicitly authorizes an extension of a prior tap on the other telephone (Gov. Br., at p. 23).

The government's extraordinary interpretation of 18 U.S.C. § 2518(5) is squarely contradicted by the provisions of Title III, by this Court's holding in *United States* v. *Giordano*, 416 U.S. 505, 94 S. Ct. 1820 at 1833-5, and by the testimony of former Attorney General Mitchell who testified in the hearing in this case as follows, under questioning by government counsel:

> "Q. In each of these procedures that you have described [with regard to authorization], was any distinction drawn between an original warrant and an application to the court to extend an original warrant, an extension? A. Not as to the procedure that would be followed with respect to the documentation and its flow through the Department of Justice, but of course in connection with an extension there were additional factors that had to be considered in connection with the product of the original surveillance" (C. 223).

We respectfully submit that this Court should squarely reject this bold effort by the government to liberalize the authorization procedures which were so strictly construed by this Court in *Giordano*.

CONCLUSION

For all of the above noted reasons, the Petition for a Writ of Certiorari should be granted; the judgments of conviction should be reversed, and a new trial should be granted.

Respectfully submitted,

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